TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]131

NEW BEDFORD DRY DOCK COMPANY, APPELLANT,

vs.

BLAKE G. PURDY, CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED SEPTEMBER 1, 1920.

(27,877)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1920.

1 *Transcript of Record of District Court.*

No. 1821. In Admiralty.

NEW BEDFORD DRY DOCK COMPANY, Libelant,

v.

STEAMER "JACK-O-LANTERN."

The Libel in this cause was filed in the clerk's office on the 19th day of March, A. D. 1920, and was duly entered at the March Term of this Court, A. D. 1920, and is as follows

Libel

(Filed March 19, 1920; Amended July 8, 1920.)

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts

The libel and complaint of the New Bedford Dry Dock Company against The Steamship "Jack-O-Lantern," her engines, boilers, tackle, apparel, furniture, equipment, etc., in a cause of contract, civil and maritime, alleges as follows

First. That libellant is a corporation organized and existing under, and by virtue of the laws of the Commonwealth of Massachusetts, and engages in the general business of shipwrights and calkers, with a shipyard located at Fairhaven, in the county of Bristol and the Commonwealth of Massachusetts.

Second. That Steamer "Jack-O-Lantern" is a vessel of the burden of one thousand gross tons, or thereabouts, is designed and is operated as an excursion and recreation steamer and is now and during pendency of process herein will be within the port of Boston and within the jurisdiction of this Honorable Court.

Third. That between the first day of June, 1919, and the first day of January, 1920, your libellant at the special instance and request of the master and owner of the said Steam-
2 ship "Jack-O-Lantern," said ship not being then, however, propelled by steam nor then named the "Jack-O-Lantern," undertook to make substantial alterations and repairs upon said vessel, and to furnish certain material and equipment in connection with said alterations and repairs in accordance with certain specifications, and copy of which is hereto annexed and marked exhibit "A," for the sum of Nineteen thousand ($19,000.00) Dollars; that in accordance with the terms of said undertaking, and in compliance with said specifications, your libellants made said alterations and repairs upon said vessel and supplied said materials

and equipment in connection thereto, whereby your libellants became entitled, as payment thereto, to the sum of Nineteen thousand ($19,000.00) Dollars.

Fourth. That your libellants had been paid on account of said Nineteen thousand ($19,000.00) Dollars, due for said work and materials, $8,200.00 on account thereof and have otherwise credited $350.00 on account; that there is a balance due of Ten thousand four hundred and fifty ($10,450.00) Dollars no part of which has been paid although duly demanded.

Fifth. That pending the performance of the work and the furnishing of the materials referred to above, your libellant, at the special instance and request of the master and owner of said ship, furnished and performed certain extra labor and supplied extra materials in connection with the alteration and repair of said ship, outside the terms of the specifications in the aforesaid contract. An itemized account of said extra labor furnished and performed and said extra materials supplied is hereto annexed and marked exhibit "B," that said extra labor furnished and supplied and said extra materials furnished as aforesaid, amounts to the sum of Eleven thousand eight hundred and ninety-three 09 100 ($11,893.09) Dollars; that said amount of Eleven thousand eight hundred and ninety-three 09 100 ($11,893.09) is a fair, reasonable, and customary charge for said labor and said material.

Sixth. That Five thousand one hundred and five 47 100 ($5,105.47) Dollars had been paid on account of said charges of Eleven thousand eight hundred and ninety-three 09 100 dollars $11,893.09) for extra labor performed and furnished and extra materials supplied, leaving a balance of six thousand seven hundred and eighty-seven 62 100 ($6,787.62) Dollars, no part of which has been paid although duly demanded.

3 Seventh. That pursuant to the provisions of an act of Congress, passed June 23, 1910, relating to liens on vessels for repairs, supplies and other necessaries, said sum of Ten Thousand four hundred and fifty ($10,450.00) Dollars and Six thousand seven hundred and eighty-seven 62 100 ($6,787.62) Dollars, totaling Seventeen thousand two hundred and thirty-seven 62 100 ($17,237.62) Dollars for said work, labor and materials aforesaid, constituting libellants' claims as aforesaid, became, and still is, a valid and subsisting maritime lien upon said vessel.

Eighth. That by reason of the premises there became, and still is due and owing from said vessel to the libellant, the sum of Seventeen thousand two hundred and thirty-seven 62 100 ($17,237.62) Dollars with interest thereon from the first day of January, 1920.

Ninth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that process in due form of law according to the course and practice of this Honorable Court in causes of

Admiralty and Maritime jurisdiction issue against the said Steamship "Jack-O-Lantern," her engines, boilers, tackle, etc., and that all persons having or claiming any right, title or interest in said Steamship "Jack-O-Lantern" be cited to appear and answer upon oath all and singular the matters aforesaid; and that this Honorable Court be pleased to decree to your libellant the amount of its claim as aforesaid, together with interest and costs, and that said Steamship "Jack-O-Lantern" be condemned and sold to satisfy the same and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

NEW BEDFORD DRY DOCK COMPANY,
By M. L. GILBERT,
President.

FRIEDMAN & ATHERTON,
GEO. R. FARNUM,
Proctors for Libellant.

COMMONWEALTH OF MASSACHUSETTS
Suffolk, ss:

March 18, 1920.

Then personally appeared the above named Mark L. Gilbert, President of said New Bedford Dry Dock Company, and made oath that the foregoing statements by him subscribed are true to the best of his knowledge, information and belief.

Before me,

GEO. R. FARNUM,
[SEAL.] *Notary Public.*

4 (Original Contract.)

EXHIBIT A.

Specifications.

All iron rails and pieces of rails set on runway in middle of hull, to be removed. Cord in middle of hull to be fared even with deck from the forward to the stage. Deck to be fared suitable to receive flooring. Hull to be drydocked.

Shaft Logs: Two shaft logs made in two pieces about ten feet long, to be about 14" by 14" filled in on the outboard and as per drawing. Lead sleeves of suitable thickness and large enough to receive a 5 inch shaft. Two transoms fitted over top and bolted to floor timbers with 7/8" iron bolts.

Rudder Ports: To be built square one on each side of hull, of three inch white pine, fifteen inch openings for a fourteen inch rudder post.

Rudder Post and Blades: White oak 14" stock about 11 feet long. Blade six foot wide from centre of stock. Blades 12" at top and 9" at bottom. Oak 9" by 9" back extending above blade 8". Tiller white oak 7" by 7" forward and fitted around stock with tongue to

receive iron strap with lugs and screw bolts about 3′ and 6″ long.

Main Deck: Fared to receive 7/8″ flooring of maple. This floor about 150′ by 29′ and 11″.

Studs: Uprights for Maine house, 6″ by 6″ planed to 5¾″ square. Ten feet long spaced 60″ on centres. Fastened to cords with two ¾ 2 blunt bolts 13″ long.

Beams: Of main house 3″ by 10″ crown 3″, planed to sides let into studs full size and fastened to studs with two carriage bolts of one half inch stock. Clips on inside of main house under beams to run entire length, will by 3″ by 10″, planed two sides. Stringer for turnbuckle rods to run entire length with scarfs 24″ long. Will be 4″ by 6″ planed on four sides. Plates for turnbuckle rods placed on stringer will be of ½″ oval iron, 3″ by ¾ 2 by 8″ long, fastened with two dog nails. 7/8″ iron turnbuckle rods placed on alternate beams as close as can be worked to beams, running through a plank, 2¾″ by 7″, placed on ends of main beams entire length as shown on plan. Angle iron gussets 3″ by 4″ by ⅜″ placed on alternate beams, fastened with 4½″ screw bolts in beams and uprights. Also on lag screw into beam as shown on plan.

Seats: Brackets for seats of two inch spruce, planed on 2 sides with one turned leg to each bracket, spaced 30″. Seats to be covered with ¼″ by 1¾″ oval faced yellow pine, with ¾″ openings. One strake of yellow pine, 3″ by 8″, planed two sides with rabbit, to be placed on top of cords and against stanchings of main house. This will be bolted with ⅝″ bolts, 16″ long into cords, and two ½″ bolts into each stud 7″ long. Sheathing on main house to be 1¾″ by 5¾″ matched cypress, fastened with 20 penny nails. Care must be taken to make the seam between the cord and the 3″ by 8″ plank water tight. Deck ceiling on top of main house to be 1¾″ by 7¾″, matched pine, planed end beaded on bottom side.

Upper House: To be built on main house about 125 feet long by about 18 feet wide, about 8 feet high in the clear. Sills to be built of yellow pine, about 4″ by 8″, fastened through sheathing and into main beam with ⅝″ by 16″ blunt bolts. Studs to 4″ by 5½″ morticed into sill and plate. Plates to be 4″ by 6″ morticed to receive tenons of studs. Studs to be placed 54″ on centres. Beams to be 2¾″ by 5″ crown 3″, spaced 36″ on centres, let into plates 2 inches, cutting plate only. Overhang to be about 7″. Sheathing to side of house to be 7/8″ by 3″ matched and beaded on one side. Vertical stanchion pieces 1¼″ by 3″ to be placed between studs, extending from floor to window stool. Sheathing to be screwed on to these. Sheathing to top of house will be 7/8″ by 3½″, on side beaded, fastened with 12 penny nails and covered with number 5 hard duck fastened with galvanized tacks. Brackets to each beam and stud to be made as shown on plan, 2¾″ thick. About thirty foot space in centre of upper house to be sheathed clear up. On one side there shall be booths installed using 7/8″ sheathing for partitions with seat on each side and table in centre. This can be either hard pine or cypress. The part of the main house deck from upper house sill to edge of overhang to be covered with number 4 hard duck, fastened with galvanized

tacks. Four scuppers in each side of top house connected and drained to top of main house. 8 scuppers on each side of main house connected and drained to deck. Pilot-house to extend full length of upper house about ten feet deep, with regulation pilot-house windows, wheel, and of the gear type pattern. All steering gear to be connected and to operate satisfactor-y as shown on plan.

Flagpoles: Four flagpoles of suitable size and height with hinged joints.

Room: In the forward end of the upper house, back of the pilot house a room ten feet wide will be partitioned off to be used as an office, with doors and windows of suitable size. Aft of this room there shall be a ladies' room, with an opening from the floor of the upper house. This room will have installed, two toilets and a wash-stand connected overboard. There shall be two stairways in the front of the boat, leading from the lower deck to the upper deck, and two in the after end of the boat leading up into the inside of the upper house. There shall be two check rooms, ladies' and gents' toilets on the lower deck, drained overboard, as shown on plan. Band stand as shown on plan. Stage with special room in rear as shown on plan. Engine room and boiler house to be built aft of main house; of suitable size and strength, with doors and windows of suitable size. Deck and bulk heads to be taken out to receive boiler and engine. Hatch in forward end of hull for ventilation. Gratings to be put up to receive life preservers and fire buckets. Opening in forward end of house to be as near as plan or picture as possible.

Rudder Skeg: To be of white oak, 10" x 10", fastened and fitted according to plan, or in the same practical way as the shaft log. All engine beds, pump beds and boiler foundation to be installed. Coal bunker to be made of matched spruce on each side, to hold about ten tons each. All floor around boiler and engine to be planked over and covered with two inches of cement clear through under coal bunker.

Main House Shear: The main house shall have a straight shear, as the hull has about a three inch raise in the centre. Every other stanchion of the main house shall run up six feet and fastened with plate and top timbers to upper deck house with a clamp under top timbers and a clamp to form rail with wire of suitable size from guard rail to deck of main house. Any other items omitted on the carpenter work will be carried on as of plan.

Painting: Hull to receive two coats of green paint above water line, one coat of copper paint below water line. All other woodwork to be finished with two coats of white paint. Top of upper house to have one coat of lead color and one coat of green. Lead color on all other canvas.

Davits: There shall be four davits, *four* on each side of the hull of suitable size to handle a lifeboat that will accommodate 15 persons each. These davits will be placed to suit Superintendent.

On the after end of the hull where the planking has started; this planking to be refastened after the rudder ports go in. Also on the after end of hull there shall be a piece of timber put on clear

across hull as shown on plan. Any refastening to be done on account of shaft logs being put in to be taken care of and fastened in workmanship manner. In case hull is launched overboard before propeller wheels and sternbearings are installed, hull must be again pulled on railway for the installation of this machinery. Work to begin as soon as hull reaches plant.

Dance Floor: This floor to be laid even and scraped and sanded, and given one coat of wax.

At the back of the band stand there shall be a smooth sheathing to run the full length of the stand up the side wall on the same curve as the gussets, about three feet outside of a line from the front of the grandstand. This to form a sounding shell.

6 (MEMORANDUM.—By agreement of counsel, itemized account of extra labor and materials, marked Exhibit "B," and Interrogatories, referred to and annexed to the foregoing libel, are here omitted.

JAMES S. ALLEN,
Clerk.)

At the same term, to wit, May 26, 1920, the following Claim was filed:

Claim.

(Filed April 3, 1920.)

Libel having been filed against the above vessel but process of arrest not having issued, comes Blake G. Purdy, of Boston, in said district, and says that he together with other owners are the true and bona fide owners of said vessel and he is the managing owner and agent of all said owners and entitled to possession of said vessel and prays that on filing stipulation for costs and to meet the decree in said cause, he may be allowed to answer and defend said libel on behalf of himself and said owners.

BLAKE G. PURDY.

Subscribed and sworn to before me this 3rd day of April 1920.
GEO. L. DILLAWAY,
Notary Public.

My Commission expires Mar. 28, 1924.

Stipulation to the Action.

Also on said third day of April, A. D. 1920, personally appeared Blake G. Purdy, of Boston, in the District of Massachusetts, managing owner and claimant of said steamer and produced for surety Fidelity and Deposit Company of Maryland. And the said Blake G. Purdy and the said Fidelity and Deposit Company submitting themselves to the jurisdiction of this Court, bound themselves, their heirs, executors and admin-strators, sucessors or assigns, jointly and severally, in the sum of eighteen thousand dollars, unto the

said libellant, that the said Blake G. Purdy shall abide by all orders and decrees, interloctutory or final, of the court, and shall pay the amount of the final decree of the court, and all sums of money that he shall be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

Also at the same term, the following Answer was filed:

7 *Answer.*

(Filed May 26, 1920.)

And now comes the claimant, and for answer says:

First. He admits the allegations of the first paragraph of the libel.

Second. He admits the allegations of the second paragraph of the libel.

Third. The claimant says that prior to the 28th day of May, 1919, he, for himself and other owners, purchased a certain scow or carboat, being a bare hull without cabin or motive power, and for the purpose of turning the same into a steamship, now the "Jack-O-Lantern," made a contract with the libelant to complete said vessel, said contract being as follows:

"I have been over the plans carefully and will do the carpenter work to complete the job; furnish all lumber, hardware, nails, iron, turnbuckles, paint, canvas for roof, steering wheel, cut shaft holes, install rudders and rig steering gear complete, install toilets as shown, build all stages, bandstand, check room, seats, furnish wire netting for upper deck, etc. for $19,000.

This bid means to build the steamer complete as authorized with exception of machinery which is to be an extra if you want us to do it.

We will take stock to the value of 20% of our bill in your company and would want payments on the balance as work advanced. You deliver hull here and accept her here when completed."

That the libelant did make alterations and repairs upon the said vessel and supplied materials and equipment in connection therewith under the terms of the said contract and the claimant admits that the libelant became entitled as payment therefor to the sum of $18,650., the amount set forth in said contract, less allow-
8 ances for certain work not done, amounting to $350.00. Other than as above admitted he denies all the allegations of the third paragraph of the libel.

Fourth. The claimant says that the libelant has been paid on account of said contract the sum of $14,505; that the claimant is also entitled to a credit on account of said contract of $144.56 for certain iron rails taken from said vessel by the libelant and sold, and a further credit of $271.62 for certain pipe and fittings furnished to the libelant by the claimant at the libelant's request, and a further

credit of $3,730, for stock shares in said vessel, being 20% of the amount of the libelant's bill, and in accordance with the terms of said contract, making a total paid to the libelant of $18,651.16. Other than is herein admitted, all the allegations of the 4th paragraph are denied.

Fifth. The claimant denies that the libelant furnished or performed any labor or supplied any materials outside the terms of the contract and specifications at any request or at a special instance of the claimant, and the claimant further denies all other allegations of the 5th article of the libel; and further answering says that if the libelant furnished any extra labor or material as set forth in said fifth article, that so far as the same is not included in the contract between the claimant and the libelant, it was furnished voluntarily, and without any request on the part of the claimant, and the claimant further says that he is ignorant as to the charges set forth in said Exhibit B., and calls upon the libelant to prove the same, if material.

Sixth. The claimant denies that the sum of $5,105.47 has been paid to the libelant on account of the libelant's Exhibit B., for extra labor performed and furnished, and materials supplied, and denies that any balance is due to the libelant for or on account of said matters.

9 Seventh. The claimant denies the allegations of the seventh paragraph of the libel in the manner and form as therein set forth, and denies that the sums therein set out as due or any other sums are due from the claimant or the said steamship.

Eighth. The claimant denies that there is due and owing to the libelant the sum of $17,237.62, with interest as alleged, or any other sum.

Ninth. The claimant says that all and singular the premises are true, but denies the admiralty and maritime jurisdiction of this honorable court, and denies that the allegations of the libel are true except so far as herein admitted.

Wherefore, the claimant prays that this libel be dismissed with costs.

BLAKE G. PURDY.

DISTRICT OF MASSACHUSETTS,
Suffolk, ss:

Personally appeared before me the above subscribed Blake G. Purdy, and made oath that the statements in the above answer and the answers to the interrogatories annexed hereto are true to the best of his knowledge, information and belief, before me

GEO. L. DILLAWAY,
Notary Public.

My commission expires March 28, 1924.

(MEMORANDUM.—By agreement of counsel, answers to interrogatories, annexed to the foregoing Answer, are here omitted.

JAMES S. ALLEN,
Clerk.)

This cause was thence continued to the present June Term, A. D. 1920, when to wit, June 24, 1920, said cause comes on to be heard on the matter of jurisdiction and is fully heard by the court and on the second day of July, A. D. 1920, an Opinion of the Court is announced, ordering decree to be entered dismissing libel for lack of jurisdiction.

On the eighth day of July, A. D. 1920, a Motion to Amend libel is filed and allowed by consent.

On the twenty-first day of July, A. D. 1920, the following Final Decree is entered:

10 *Final Decree.*

(July 21, 1920.)

MORTON, *J.:*

This case came to be heard on so much of the answer as sets up lack of jurisdiction for the reason, as alleged, that the contract sued upon was not of such character as to create a maritime lien, and upon such facts as were orally agreed upon by counsel in open court at the hearing all of which so far as deemed material are set forth in the opinion of the Court filed herein, and was argued by counsel and after consideration, it is hereby ordered, adjudged and decreed that the libel be dismissed for lack of jurisdiction.

By the Court,

ARTHUR M. BROWN,
Deputy Clerk.

From the foregoing final decree the libelant claims an appeal to the Supreme Court of the United States and gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, and said appeals is allowed accordingly.

Opinion of the Court.

July 2, 1920.

MORTON, *J.:*

This case was heard on so much of the answer as sets up lack of jurisdiction for the reason, as alleged, that the contract sued upon was not of such character as to create a maritime lien. The facts, which are simple, were orally agreed on by counsel in open Court at the hearing, and are as follows:

The "Jack-O-Lantern" was originally a car-float of the usual type, something over two hundred feet long, with neither motive power nor steering gear, and having two lines of track on her single deck

The claimant bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, a large house, or super-structure, was built enclosing most of the deck and containing a dance-hall, rooms, balconies, etc. Steering apparatus and a steam plant of the propeller type for propulsion were also installed.

11 For the purpose of carrying out these changes the contract now before the Court was made between the claimant and the libellant. It covers, generally speaking, all the wood-work involved in the changes above outlined. The libelant did not install the power plant but it did prepare the vessel for it. The scow was towed to the libellant's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left the libellant's yard, she was towed away. The contract and specifications are as stated in the pleadings.

The present question is, whether, upon the foregoing undisputed facts, the contract was one for repairs and supplies such as creates a maritime lien. It is too late now to question, in a court of first instance at least, the rule that a contract to construct a vessel does not give rise to such a lien. In rebuilding operations the test is whether the identity of the vessel has continued or has been extinguished. It would serve no useful purpose for me to discuss the cases referred to in argument by the libellant. The matter turns, as I view it, upon a question of fact; and upon the facts stated I think it clear that the identity of the car-float which was delivered to the libellant was completely lost by the conversion into an amusement steamer under the contract in suit. It is true that the hull is substantially unchanged; but mere identity of hull is not sufficient to preserve the identity of the vessel.

(McMaster v. One Dredge, 95 F. R. 832; The Dredge A, 217 F. R. 617, 629, 630.) The "Jack-O-Lantern" with her dance-hall, rooms, and power-plant, self-propelled and able to manœuvre, is an essentially different vessel from the car-float which furnished the hull.

Decree dismissing libel for lack of jurisdiction.

Libelant's Petition for Appeal.

(Filed July 21, 1920.)

To the Honorable Justices of The District Court in and for the District of Massachusetts:

12 Your petitioner, the New Bedford Dry Dock Company, in the above entitled cause, would respectfully represent and show that in the above entitled cause pending in this court, there was entered at the June term, 1920, a final decree greatly to the prejudice and injury of your petitioner, which said decree is erroneous and inequitable in many particulars.

Wherefore, in order that your petitioner may obtain relief in the premises, and have opportunity to show the errors complained of, your petitioner prays that it may be allowed an appeal in said cause

to the Supreme Court of the United States and that the proper orders touching the security required of it may be made.

NEW BEDFORD DRY DOCK COMPANY,
By GEORGE R. FARNUM,
Its Proctor.

Allowed
J. M. MORTON,
U. S. D. J.

Libelant's Assignment of Errors.

(Filed July 21, 1920.)

Now comes the libellant, the New Bedford Dry Dock Company, in the above entitled cause and having claimed an appeal to the Supreme Court of the United States from the final decree entered herein dismissing the libel for lack of jurisdiction, files this its assignment of errors:

(1) That the Court erred in deciding that the contract or contracts sued upon were not of such character as to create a maritime lien.

(2) That the Court erred in deciding that the work performed by the libellant was not of such character as to create a maritime lien.

(3) That the Court erred in deciding that the identity of the vessel, a car-float, upon which the work was performed, was completely lost by its conversion into an amusement steamer, and that the libel should be dismissed for lack of jurisdiction.

(4) That the Court erred in entering a decree dismissing the libel for lack of jurisdiction.

Wherefore your libellant prays that said decree may be reversed.
By its Proctor,

GEORGE R. FARNUM.

13 *Bond on Appeal.*

(Filed and Allowed July 21, 1920.)

Know all men by these presents, That I, New Bedford Dry Dock Company, a Massachusetts corporation having a usual place of business at Fairhaven in said Commonwealth of Massachusetts are held and firmly bound unto Blake G. Purdy of Boston, Suffolk County, Massachusetts in the full and just sum of two hundred and fifty ($250) dollars to be paid to the said Blake G. Purdy his certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the eighth day of July in the year of our Lord one thousand *eight* hundred and twenty.

Whereas lately at a District Court of the United States for the District of Massachusetts in a suit in admiralty depending in said Court between New Bedford Dry Dock Company and the Steamer "Jack-O-Lantern," her engines, etc. a final decree was rendered against the said New Bedford Dry Dock Company and the said New Bedford Dry Dock Company having obtained an Appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Blake G. Purdy citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said New Bedford Dry Dock Company shall prosecute its said Appeal to effect, and answer all damages and costs, if it fails to make its plea [illegible] above obligation to be null and void; otherwise to remain in full force and virtue.

NEW BEDFORD DRY DOCK COMPANY. [SEAL.]
By MARK L. GILBERT,
Pres.

Signed, sealed and delivered in presence of
GEORGE R. FARNUM.

Approved; and sureties waived.
GEO. L. DILLAWAY,
Proctor for Claimant.

July 21, 1920.

Approved
J. M. MORTON, JR.,
U. S. District Judge.

14 *Agreement as to Record.*

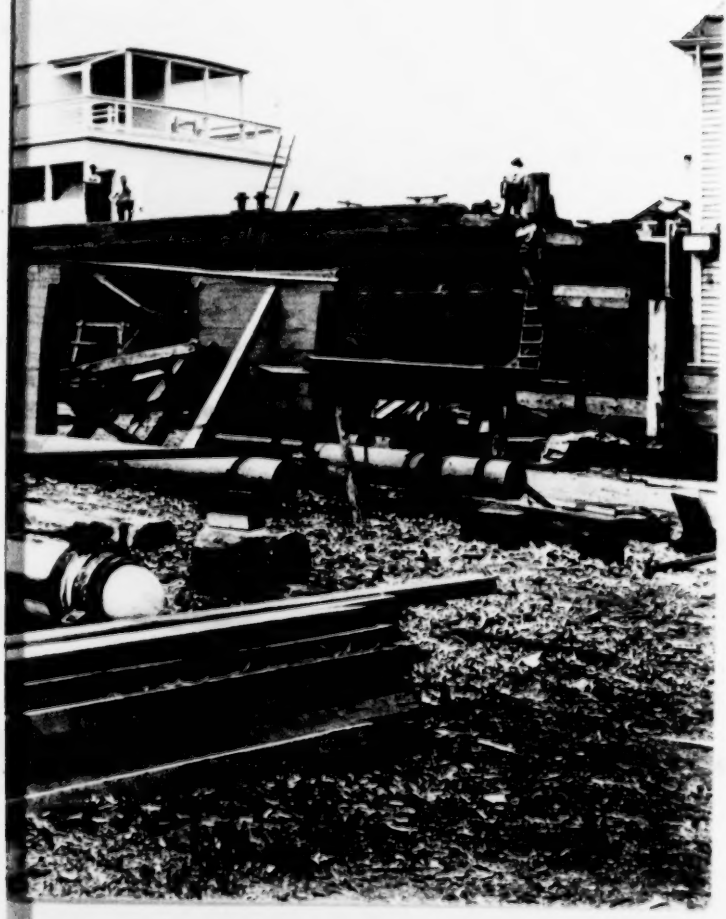
(Filed July 27, 1920.)

It is hereby agreed that Exhibit "B," consisting of an itemized statement of extra labor furnished and performed and extra materials supplied, annexed to the libel, the interrogatories annexed to the libel and the claimant's answers to the said interrogatories, may be omitted from the record on the appeal to the United States Supreme Court, the same not being material to the issues raised on said appeal.

GEORGE R. FARNUM,
Proctor for Libellant.
GEO. L. DILLAWAY,
Proctor for Claimant.

LIBELLANT'S EXHIBIT 1.

(Here follows photograph.)



15 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Blake G. Purdy, of Boston, Massachusetts, Claimant of Steamer "Jack-O-Lantern," Designed and Operated as an Excursion and Recreation Steamer at the Port of Boston, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the twenty sixth day of August next, pursuant to an Appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein the New Bedford Dry Dock Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, engaged in the business of shipwrights and caulkers, with a shipyard located at Fairhaven, County of Bristol, Commonwealth of Massachusetts, appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George W. Anderson, Circuit Judge duly assigned to hold the District Court of the United States for the District of Massachusetts this twenty seventh day of July, in the year of our Lord one thousand nine hundred and twenty.

G. W. ANDERSON,
United States Circuit Judge (Acting in the Absence of Judge Morton).

16 *Acknowledgment of Service of Citation on Appeal.*

Service of the within citation is hereby acknowledged.

GEO. L. DILLAWAY,
Proctor for Claimant and Appellee.

17 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the cause in admiralty entitled, No. 1821, New Bedford Dry Dock Company, Libelant, v. Steamer "Jack-O-Lantern," in said District Court determined, the opinion of the Court, dated July 2, 1920, the Petition for Appeal, the Assignment of Errors, the Bond on Appeal, the

Agreement as to Record, and also the original Citation issued upon the appeal of the libelant, with the Acknowledgment of Service thereon

In Testimony Whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this twenty-first day of August, A. D. 1920.

[Seal of the United States District Court, Massachusetts.]

JAMES S. ALLEN,
Clerk.

Endorsed on cover: File No. 27,877. Massachusetts D. C. U. S. Term No. 520. New Bedford Dry Dock Company, appellant, vs. Blake G. Purdy, claimant of the Steamer "Jack-O-Lantern." Filed September 1st, 1920. File No. 27,877.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

Supreme Court of the United States.

No. 520. October Term, 1920.

NEW BEDFORD DRY DOCK COMPANY,
APPELLANT,
v.
BLAKE G. PURDY, Claimant of the Steamer "Jack-O-Lantern."

Motion to Advance Case and Memorandum in Its Support.

GEORGE R. FARNUM,
40 Court Street, Boston, Mass.
Attorney for Appellant.

LEE M. FRIEDMAN,
30 State Street, Boston, Mass.
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 520.

NEW BEDFORD DRY DOCK COMPANY,
APPELLANT,
v.
BLAKE G. PURDY,
CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

ASSENT TO ALLOWANCE OF MOTION.

The appellee, Blake G. Purdy, claimant of the Steamer "Jack-O-Lantern," hereby waives notice of the motion of the appellant to advance the case upon the docket of this Court for a speedy hearing, a copy of which motion and of the brief in support thereof follows hereafter, and hereby assents to the allowance of same on presentation.

GEO. L. DILLAWAY,
Attorney for Appellee.

BOSTON, December 27, 1920.

Delivery of a copy of the motion to advance the case and brief in support of the motion is hereby acknowledged.

GEO. L. DILLAWAY,
Attorney for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 520.

NEW BEDFORD DRY DOCK COMPANY,
APPELLANT,
v.
BLAKE G. PURDY,
CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

MOTION TO ADVANCE CASE.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The appellant, New Bedford Dry Dock Company, respectfully shows to this Honorable Court as follows:

That this is a direct appeal under section 238 Judicial Code from a decree of the District Court of Massachusetts dismissing a libel in admiralty for lack of jurisdiction.

The appellant, a Massachusetts corporation, filed its libel against the Steamer "Jack-O-Lantern" to recover a balance of $17,237.62 claimed to be due for certain work done and materials furnished in the alteration and repair of said vessel.

The "Jack-O-Lantern" was originally a car-float of the usual type, something over two hundred feet long,

with neither motive power nor steering gear, and having two lines of tracks on her single deck. The appellee bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, and a large house or superstructure was built enclosing most of the deck and containing a dance hall, rooms, balconies, etc. Steering apparatus and a steam plant of the propeller type of propulsion were also installed.

For the purpose of carrying out these changes, the contract and specifications stated in the pleadings were made between the appellee and appellant. It covers, generally speaking, all the woodwork involved in the changes above outlined. The appellee did not install the power plant, but it did prepare the vessel for it. The vessel was towed to the appellee's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left the appellee's yard, she was towed away.

The hull remained substantially unchanged, and the vessel may be again readily converted into the original car-float by simply removing the pavilions constructed upon its deck and the power plant. Attention is directed to the exhibit appearing after page 12 of the Record (photo of vessel in appellee's yard).

The District Court ruled that "the identity of the car-float was completely lost by the conversion into an amusement steamer under the contract in suit" and that the case was governed by "the rules that a contract to construct a vessel does not give rise to such a maritime lien, and that the 'Jack-O-Lantern' with her dance-hall, rooms and power plant self-propelled and

able to manoeuvre is an essentially different vessel from the car-float which furnished the hull," citing only *McMaster* v. *One Dredge*, 95 Fed. 832; *The Dredge A*, 217 Fed. 617, 629, 630; and entered a decree dismissing the libel for lack of jurisdiction.

The only question at issue in this appeal is the question of the jurisdiction of the Court below, or, in other words, the propriety of the ruling dismissing the libel for lack of jurisdiction.

Wherefore the appellant moves that, in accordance with Rule 32 of the rules of this Court, the appeal be advanced upon the docket of this Honorable Court for a speedy hearing.

NEW BEDFORD DRY DOCK COMPANY,
By its Attorneys,
LEE M. FRIEDMAN,
GEORGE R. FARNUM.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. BOSTON, December 29, 1920.

Lee M. Friedman, being duly sworn, deposes and says that he is counsel for the New Bedford Dry Dock Company, appellant; that he prepared the foregoing motion; and that the allegations therein contained are true to the best of his knowledge and belief.

Subscribed and sworn to, before me,

PERCY A. ATHERTON,
[seal] Notary Public.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 520.

NEW BEDFORD DRY DOCK COMPANY,
APPELLANT,
v.
BLAKE G. PURDY,
CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

MEMORANDUM FOR APPELLANT IN SUPPORT OF MOTION TO ADVANCE CASE.

The appellant urges in support of the allowance of its motion to advance the following considerations:

I.

The only question at issue in this appeal is the question of the jurisdiction of the Court below. The Court below dismissed the libel on the sole issue of lack of jurisdiction. The case therefore falls within the scope of Rule 32 of the rules of this Court, that, where the only question at issue is that of the jurisdiction of the Court below, the case will be advanced on motion.

II.

The case presents a novel and interesting issue of general public importance.

III.

The amount involved in this case is substantial. If the appeal is disallowed, the appellant will be obliged to resort to some remedy in the Courts of the Commonwealth of Massachusetts. His rights then may be substantially prejudiced if this appeal is disallowed after the lapse of a long period of time.

GEORGE R. FARNUM,
Attorney for Appellant.

LEE M. FRIEDMAN,
Of Counsel.

Office Supreme Court, U. S.
FILED
DEC 12 1921
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

October Term, 1921.

No. 131.

NEW BEDFORD DRY DOCK COMPANY,

APPELLANT,

v.

BLAKE G. PURDY,

CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

Brief for Appellant.

LEE M. FRIEDMAN,
GEORGE R. FARNUM,
Attorneys for Appellant.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

October Term, 1921.

No. 131.

NEW BEDFORD DRY DOCK COMPANY,
APPELLANT,
v.
BLAKE G. PURDY, CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

BRIEF FOR APPELLANT.

Statement of Facts.

THE APPEAL.

This is a direct appeal under section 238, Judicial Code (Act March 3, 1911, 36 Stat. 1087, 1157, c. 231), from a decree of the District Court of Massachusetts dismissing a libel in admiralty for lack of jurisdiction.

FACTS.

Appellant, a Massachusetts corporation, filed its libel against the steamship "Jack-O-Lantern" to recover a balance claimed to be due for certain work done and materials furnished in the alteration and repair of said vessel.

The "Jack-O-Lantern" was originally a car-float of

the usual type, something over two hundred feet long, with neither motive power nor steering-gear, and having two lines of tracks on her single deck. The appellee bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing-floor and a large house or superstructure was built enclosing most of the deck and containing a dance-hall, rooms, balconies, etc. Steering-apparatus and a steam-plant of the propeller type for propulsion were also installed.

For the purpose of carrying out these changes, the contract and specifications stated in pleadings were made between the appellee and appellant. It covers, generally speaking, all the woodwork involved in the changes above outlined. The appellant did not install the power-plant, but it did prepare the vessel for it. The vessel was towed to the appellant's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left appellant's yard, she was towed away.

The hull remained substantially unchanged, and the vessel may be again readily converted into the original car-float by simply removing the pavilions constructed upon its deck and the power-plant. Attention is directed to the exhibit (photograph of vessel in appellant's yard).

DECISION OF THE DISTRICT COURT.

The District Court ruled that "the identity of the car-float was completely lost by the conversion into an amusement steamer under the contract in suit" and

that the case was governed by "the rules that a contract to construct a vessel does not give rise to such a maritime lien, and that the 'Jack-O-Lantern' with her dance-hall, rooms and power plant self-propelled and able to manoeuvre is an essentially different vessel from the car-float which furnished the hull," citing only—

McMaster v. *One Dredge*, 95 Fed. 832.
"*The Dredge A*," 217 Fed. 617, 629, 630.

Argument.

I.

THE VESSEL IS OF A CHARACTER SUBJECT TO ADMIRALTY JURISDICTION.

The character of the craft, whether considered as a car-float with a superstructure in which people can sit and dance or as a floating pleasure craft and dance-hall, is included within admiralty jurisdiction. It was a complete "vessel," a moveable, floating structure capable of navigation and designed for navigation.

In re Eastern Dredging Company, 138 Fed. 942 (mud-scow).
"*The Robert W. Parsons*," 191 U.S. 17 (canal-boat).
"*The Wilmington*," 48 Fed. 566 (canal-boat).
"*The New York*," 93 Fed. 495 (barge).
Ex parte Easton, 95 U.S. 68 (barge).
"*The Public Bath No. 13*," 61 Fed. 692 (floating bathhouse).
"*The Hezekiah Baldwin*," Fed. Cas. 6449 (floating elevator).

Lawrence v. *A Flat Boat*, 84 Fed. 200 (flatboat).

Southern Log Cart & Supply Co. v. *Lawrence*, 86 Fed. 907 (flatboat).

Malthy v. *Steam Derrick*, Fed. Cas. 9000 (movable derrick and pile-drivers).

II.

THE LEGAL QUESTION HERE INVOLVED.

It is now so firmly settled as to be no longer open to argument that contracts for the construction of new ships are non-maritime, and not within admiralty jurisdiction.

Thames Co. v. "*The Francis McDonald*," 254 U.S. 242.

There are numerous cases which, from time to time, have defined the line which is to be drawn between the claims which are for part of the construction of a ship and those which are to be considered, not as part of the original construction of the ship, but in the nature of repairs, alterations, or changes in an existing vessel. The case now at bar raises the question where the line is to be drawn, not at the beginning of a vessel's existence, but at the end of its career. The issue is not when the congeries of wood and iron begins existence (*Tucker* v. *Alexandroff*, 183 U.S. 424, 438) as a ship, but when the ship ceases to be such and is dissolved into its component parts. The case at bar presents the question where the line is to be drawn to determine when a vessel ceases to be a vessel so that any construction which uses its parts is not a continuance of the existing entity, but is the creation of a new entity.

Is the vessel a ship *in esse* remodelled, or a new craft created from the congeries of wood and iron—ordinary pieces of personal property which were taken out of the construction of another vessel and now reused as separable, individual items to build a new ship which had not before existed?

The appellant's contention here is that its work did not create a new maritime entity previously non-existent, but that the original car-float is still the present vessel, although it has a structure on its deck instead of car-rails.

III.

THE AUTHORITIES.

The issue presented in this case seems to have been raised before this court in *Rounds* v. *Cloverport Foundry*, 237 U.S. 303, where the defendant in error contended that the contract was non-maritime because "the old boat was dismantled, its identity destroyed, and a new boat built"; but this court did not then discuss or determine this question, as the case was disposed of on other grounds.

From time to time various of our admiralty courts have attempted to define that state of dismantling of a vessel when an existing vessel loses its identity so that the use made of its parts is a building of a new boat, and not the reconstruction of the existing vessel.

Presenting and analyzing these cases chronologically, they are as follows:

1849. "*The Ferax*," Fed. Cas. 4737:

A Massachusetts statute gave a lien in the case of the construction or repair of a vessel. A ship was brought

to the libellant for alteration. He put up berths, bulkheads, tables, etc., set up a number of deck-lights in the deck for staterooms, and otherwise fitted the boat to accommodate passengers for a California voyage. The District Court puts the query: "Suppose a vessel is changed from a brig into a bark, or internal alterations made to fit a merchantman for a whaleman; or suppose a vessel be coppered for the first time on a change of destination," and suggests that the work in the instant case was in the nature of alterations, and could not be treated as "repairs," which is restoration, and decides that alteration was "reconstruction," not orginal construction, and as such was plainly within the scope of the act, and held that the libellant had a lien.

1873. *Smith* v. "*The Royal George*," Fed. Cas. 13,102:

A ship carpenter was employed to build a new hull for a vessel. After the hull was completed, boilers and a pilot-house and its roof were taken from an old boat and put on the new hull. *Held* that there was no lien, inasmuch as the libellant had assisted in the building of a new boat "on which some of the materials from an old dismantled boat" were used, and that this did not make it an old boat, but it was a new boat.

1875. *Hardy* v. "*The Ruggles*," Fed. Cas. 6062:

Question whether "The Ruggles" was a new ship. (Hughes, D.J.): "Her hull was left intact. The frame of the engine, the boiler, the apparatus connected with the propelling wheel, and the wheel itself remained. There was no change of the model of the vessel except such as was necessary to giving her greater length.

All the old timber in the hull that was sound was retained in its former position. There was no breaking up of the vessel." The court then cites with approval an extract from Molloy: "If a ship be ript in parts, and repaired in parts, and taken asunder in parts, yet she remains the same vessel and not another; nay, though she hath been so often repaired that there remains not one stick of the original fabric"; and then holds that, although the steamboat was burnt to the water's edge, and in the rebuilding the length of the vessel was increased, yet as the old hull was used, it was a case of the old vessel rebuilt, and not a new vessel built.

1876. *United States* v. "*The Grace Meade*," Fed. Cas. 15,243:

A boiler exploded and sank "The Agnes," her sides were blown away, large openings blown into both sides of her hull. The boiler was ruined, the engine much damaged, the hull broken into halves, the deck blown off from the engine-room to the bow, most of the timbers of the vessel much shattered, all the ribs destroyed except three or four, the stern-post too much injured for reuse, and the wreck generally a bad one. The vessel was raised, the machinery was got out except the shaft, the engine-frame, and the wheel, which could not be removed. The vessel was left lying on the flats from October 1, 1872, to May, 1873. A vessel was then reconstructed in part out of new material and part out of the old, and the boat so built was called "The Grace Meade." The inquiry was whether in point of law "The Grace Meade" was a new vessel or the old

vessel "Agnes" rebuilt. It was held that "The Grace Meade" was a new vessel.

(Hughes, D.J.:) "And generally, it may be held as a principle, that, where the keel, stem, and stern-posts and ribs of an old vessel, without being broken up, and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel."

1879. *Hartupee* v. "*The Coal Bluff No. 2*," Fed. Cas. 6172:

A lien depended on the identity of boats, and the question before the court was whether liens against the former boat "Coal Bluff" should be allowed to participate in the fund arising from the sale of "Coal Bluff No. 2." An entirely new hull was built. The old cabin and machinery were used. The court quotes with approval the opinion of the commissioner: "Where the absolutely essential portions of an old vessel, as the frame of the hull, are preserved intact, in reconstruction, the vessel is considered the same in law, but when not so preserved, and the absolutely essential portion new, as the hull, then the vessel is a new one, and may bear a new name. When first considering the question at what point transformation from the old to the new takes place, it is somewhat perplexing, and a satisfactory decision is not easily arrived at." The court refers to the cases of *Smith* v. "*The Royal George*" and *United States* v. "*The Grace Meade*" and the opinions

of various textbook writers, and comes to the conclusion that the second boat was a new vessel. "A new hull having been constructed and but comparatively little of the timbers of the old boat entering into the new, we are of the opinion that 'Coal Bluff No. 2' is a new boat."

1899. *McMaster* v. *One Dredge*, 95 Fed. 832:

A wood-scow or barge was altered into a dredge under a contract which called for payments of $640 and specified the details. Also certain machinery was repaired. It was held: "The purpose of this contract was to build this scow into a dredge. As a mere wood barge the things done were not required. It was only for the purpose of a dredge, which, in its relation with the scow, was a new thing, that the work and labor in this case were performed, and the materials furnished, and this is a building of the dredge . . . what was done and supplied in this case was for the purpose of making the vessel what it was intended to be, and what it had theretofore not been,—a dredge, a thing with which the wood scow, as such, had no relation." The opinion fails to cite any of the previous decisions, and treats the question as if it were a matter of novel impression.

1900. "*The Iris*," 100 Fed. 104, 108:

(Putnam, C.J.:) "It is claimed that the labor and supplies were for construction, and not for repairs. It is true that the expenditures were large, compared with the value of the vessel, and that she was, through them, readapted for a trade for which she had not been originally designed. Nevertheless, with reference to the

questions which arise in this case, they were not analogous to work done in the construction of a new vessel, nor even to the reconstruction of one which, through wreck or age, had become unsuitable to navigate the seas. At the time the labor and supplies were furnished, she was a sea going steamer; and, although her repairs were made under the supervision of a United States inspector of steam vessels, they were only such as were found necessary to adapt her for her new route. Therefore the labor and supplies are to be taken as furnished for repairs, and not for construction, as those expressions are understood in the various decisions of the federal courts."

1900. "*The Roanoke*," 101 Fed. 298:

A steamship which was adapted for service on the Great Lakes was turned over to libellant for extensive repairs and alterations, which adapted her for ocean service. There was considerable work on the hull and part of it was removed. The case went off on other grounds, but it is intimated that the changes were repairs, and not rebuilding of a new ship.

1908. "*The Emma B.*," 162 Fed. 966:

A schooner was used in the summer for excursion parties and in the winter for mackerel fishing. Her owners at the end of each season caused her to be altered for the purpose of the coming season. The libellant did certain work, changing her from an excursion boat to a fishing boat. The court found that the changes "probably did make her more fit for fishing than for excursion parties," yet ruled that these changes did not alter her character, and they were repairs, and not construction.

1910. *"The O. H. Vessels,"* 183 Fed. 561 (C.C.A. 3):

The ship had been engaged in carrying coal, hay, and other material of that character. Her sides were open to the weather. It was desired to put her into condition to carry perishable freight, and so it become necessary to enclose her deck. It was held that no alterations were made which would change the character of the barge. The work done in enclosing the vessel's deck could fairly be termed "repairs and not construction."

1914. *"The Dredge A,"* 217 Fed. 617:

A partially completed vessel at Philadelphia was brought to Beaufort, North Carolina, where it was completed and thereafter operated as a dredge. The questions presented were: (1) Whether the debts originating while the dredge was under construction were maritime liens. (2) Whether the debts originating while the dredge was in operation at Beaufort were maritime liens. There was a finding of fact that originally one Mitchell bought a certain old hull and carried the same to a shipyard at Philadelphia for the purpose of overhauling and reconstructing the same into a dredge. "The old hull so purchased by Mitchell had been built from timbers taken from an old government dry dock, and at the time contained a boiler, a condenser and heater and was not at this time a completed boat" (pp. 624, 630). The court held that "it would be to strain the meaning of words to call the thing, or object, thus described, a ship or vessel . . . The 'Dry Dock' timbers, from the timbers of which the hull was constructed, was not a ship. . . . He [Mitchell] gathered certain elements, which, when brought together, as-

sembled, co ordinated, resulted in, or brought into existence the entity, the thing, which he desired. The 'old hull' was the first element obtained, and upon this he placed certain machinery and appliances, which, being brought into orderly relation, constituted the dredge. The process, described by the master, is not 'reconstructing' or repairing an existing entity, but, by bringing together—correlating—a number of independent entities, constructing a definite entity; and this process is construction" (pp. 631-632). It was therefore held that there was no lien for work or material provided at Philadelphia.

The opinion, other than citing *McMaster* v. *One Dredge*, ignores the cases which we have called to the attention of this court, and the decision is rested wholly on the authority of the McMaster case.

Textbooks.

Malynes, "Consuetudo, vel Lex Mercatoria" (edition 1686), p. 123:

"Some make a question, whether a ship so amended and repaired shall be taken to be the same. But it is clear, that so long as the keel of the ship remaineth, it is still the same ship."

Justice, "Sea Laws" (edition 1705), p. 442:

"If a ship be broken up or taken in pieces, with an intent to convert the same to other uses; if afterwards upon advice or change of mind, she be rebuilt with the same materials, yet this is now another, and not the same ship, especially if the keel be ript up or changed, and the whole ship be once taken assunder and rebuilt, there determines the partnership as to the ship.

"But if a ship be ript up in parts, and taken assunder in parts and repaired in parts, yet she remains still the same vessel and not another; nay though she hath been so often repaired that there remains not one stick of the original fabrick."

1 Boulay-Paty, "Droit Commercial Maritime," p. 104:

"Il en serait autrement, si le vaisseau avait été démonté et rebâti, fut-ce des mêmes planches, sans que le fond du vaisseau subsistât toujours en son entier."

Emerigon on Insurance, c. 6, sec. 7 (Meredith's edition), p. 144:

"A ship is always presumed the same, though all the materials which at first had given it existence have been successively changed: Navim, si adeo saepe refecta esset, ut nulla tabula eadem permaneret, quae non nova fuisset, nihilominus eandem navim esse existimari. The Athenians preserved the galley of Salamis, during more than 1000 years, from the time of Theseus until the reign of Ptolemy Philadelphus. They were at great pains to replace the old with new planks: and hence arose a great dispute among the philosophers of the time; namely, whether this vessel, of which there did not remain a single original piece, was the same which conveyed Theseus, the conqueror of the Minotaur, in returning from the isle of Crete. The same question even now is stirred on the subject of the Bucentaur, a kind of sacred galley used on Ascension day in every year, by the nobles of Venice, when the doge performs the ceremony of espousing the sea. Though all the members of a body, or its parts, are changed through the lapse of time, nevertheless by

force of substitution the body is still presumed the same: Licet spatio temporis singula corpora mutentur, tamen, mediante subrogatione, semper dicitur eadem res. It is always the same people, the same senate, the same legion, the same edifice, the same flock, the same ship, etc.; Idem populus, eadem navis, idem aedificium, idem grex, idem vivarium, etc."

Parsons, "Shipping & Admiralty," pp. 80, 82:

"A ship would undoubtedly remain and continue to be the same ship, however extensively or frequently repaired; and even if at last all her original materials had disappeared. So, if she were taken to pieces with intent to reconstruct her and this was done. But it is said, that, if taken to pieces without this intent and afterwards reconstructed in part, she is a new ship."

Desty, "Shipping & Admiralty," p. 8:

On the strength of the cases of *Hardy* v. *"The Ruggles"* and *United States* v. *"The Grace Meade,"* Desty states as the law: "where the frame of the hull is not broken up in rebuilding, the vessel retains its name and identity . . . it is regarded as the same vessel in law."

Benedict, "Admiralty" (4th edition), p. 126, sec. 158.

"A ship is always the same ship although the original materials of which it was composed may, by successive repairs and alterations have been, in the course of time, entirely changed, and if a ship be entirely taken to pieces without the intention of reconstruction, and the same materials are reconstructed into a ship in

precisely the same manner, it would not be the same but another ship."

IV.

OUR CASE.

No elaborate discussion of the facts in this case can be necessary in the face of the photograph (Record, 12), and the admission stated in the opinion (Record, 10): "it is true that the hull is substantially unchanged."

The comparison of a "car-float" with a "steamer to be used for amusement purposes" seems to have misled the trial court into the error of concluding that, because a car-float is so different from such a steamer, we have a new vessel created *ab initio*.

The change of use or adaptability is not the test. Without becoming a new vessel, a merchantman may become a whaleman, a lake steamer an ocean craft, a coal-barge a freighter for perishable cargoes, an excursion schooner a mackerel fisherman. Adaptation for "a trade for which she was not originally designed" has repeatedly, and in instances explicitly, been rejected as the test of identity.

The only thing taken away from the car-float is the rails. A new deck is substituted for the old deck. From that stage all the rest are additions. So far this case is unique and different from all others in the books, because as it now stands it presents an instance of destroying the identity of a ship *in esse* by the quantity of the additions to a hull left intact.

Remove the light superstructure which has been built over part of the deck and relay the rails. You have not built a new car-float out of an amusement steamer. You

have not a third new entity, but you have back again the old car-float.

Begin step by step and test the district judge's reasoning. Place machinery in the old hull, and, while you have made the car-float self-propelling, you have not changed the identity of the craft. Then take up the rails to let couples dance on its deck. You do not then create a new vessel out of the car-float. Even relaying the deck to make dancing easier will not work a metamorphosis. If these changes have not created a new vessel, if a new entity was created, it must have been done by the erection of the superstructure. The authorities, however, make it clear that neither the size of the expenditure nor the extent of the additions is material if they are merely additions to the existing entity. Just as you can rip out all the insides of "The Ferax," add staterooms and all the paraphernalia to carry gold seekers over the seas to California, and still retain the identity of the original vessel, so, we submit, no matter how much paint and gingerbread frills have been added, through its disguise the court will see the original car-float.

If the test to be gathered from the authorities is the identity of the hull, whether we call this vessel a car-float or an amusement steamer, the entity is one and the same, as admittedly its hull has remained "substantially unchanged."

V.

RULE IN PEOPLES FERRY CO. v. BEERS.

The restrictive rule of *Peoples Ferry Co.* v. *Beers*, 20 How. 393, standing "opposed to the maritime law of practically all the world" (Hughes, Admiralty, 116),

subject to "possible and once not inappropriate criticism (254 U.S. 244), should not be extended beyond its present scope. Cases decided subsequently have not extended the rule beyond cases of original construction.

Roach v. *Chapman*, 22 How. 129.
Edwards v. *Elliott*, 21 Wall. 532.
"*The Winnebago*," 205 U.S. 354.
Thames Co. v. "*The Francis McDonald*," 254 U.S. 242.

The instant case falls without the scope of the reasons underlying the original-construction rule.

The basis for this rule is that "the structure does not become a ship, in the legal sense, until it is completed and launched."

Tucker v. *Alexandroff*, 183 U.S. 424, 438.
North Pacific S.S. Co. v. *Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119.

The rule is therefore inapplicable to a case where the structure at the time had been launched and was in use as a *completed* vessel.

VI.

CONCLUSION.

We respectfully submit that the decision of the District Court should be reversed, and the case remanded to that court for further proceedings.

LEE M. FRIEDMAN,
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Office Supreme Court, U. S.
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Supreme Court of the United States.

October Term, 1921.

No. 131.

NEW BEDFORD DRY DOCK COMPANY,
APPELLANT,
v.
BLAKE G. PURDY,
CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

Supplemental Brief for Appellant.

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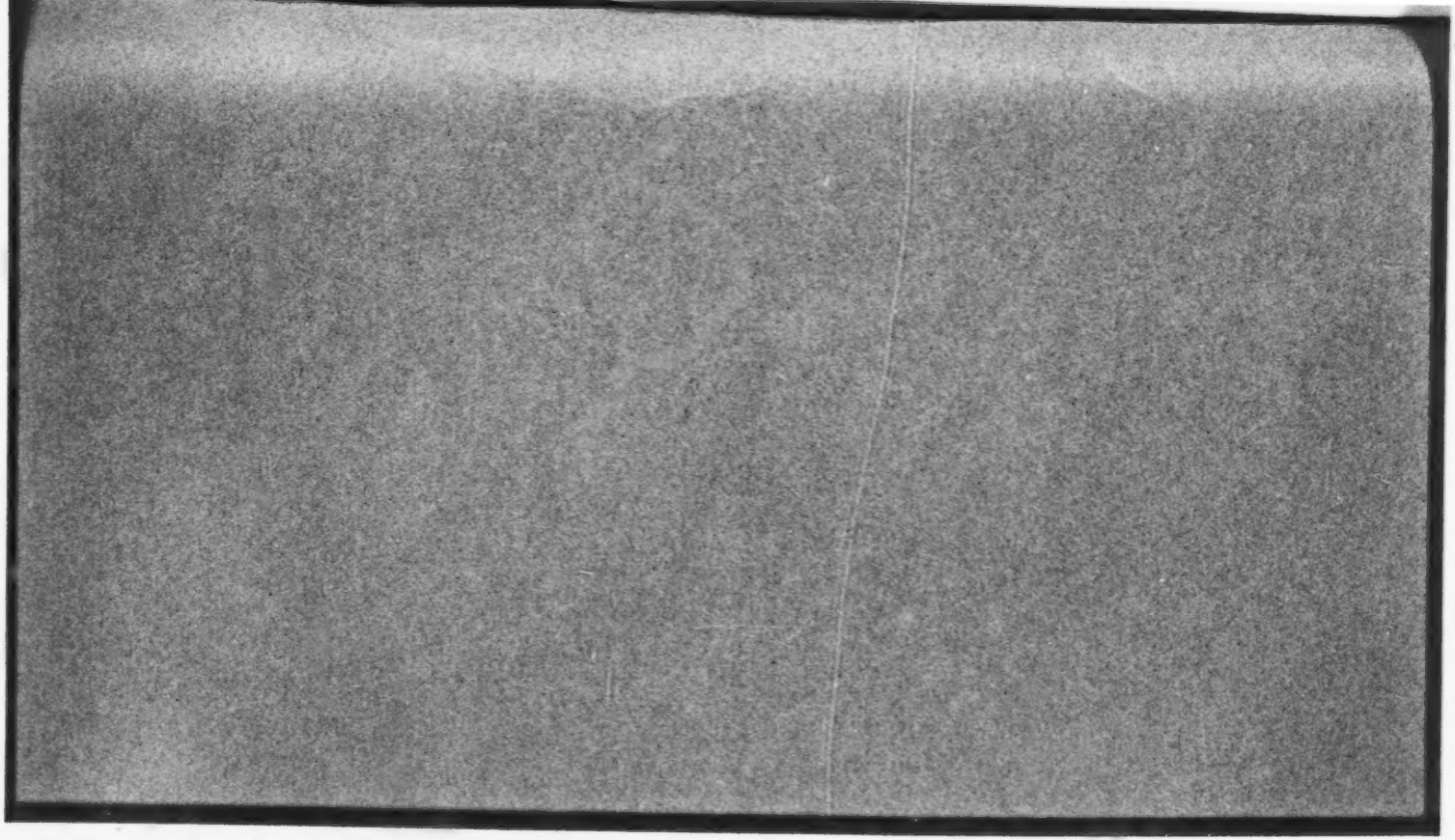

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SUPPLEMENTAL BRIEF FOR APPELLANT.

RECONSTRUCTION OR REPAIRS.

(A)

Inasmuch as Comp. St. sec. 7783 (Act June 23, 1910, c. 373, sec. 1), gives a maritime lien to a person "furnishing repairs, supplies, or other necessaries," the appellee, relying on a single decision—*The Susquehanna*, 267 Fed. 811—attempts to draw a distinction between repairs and reconstruction. He claims that the work on the "Jack-O-Lantern" was, in the words of the New York court, "more in the nature of reconstruction than of repairs," and therefore not "repairs" within the wording of the statute.

This is the beginning of a refinement in the interpretation of this statute which, like the distinction between original "construction" and "repairs," will engraft another warp on our admiralty laws, throwing

them out of alignment with those of other jurisdictions. This case stands now at the very beginning of this distinction. Today this court has no long line of venerable precedents which it may reluctantly feel compelled to follow. Unless, therefore, there is in the irresistible logic of the proposed distinction some compelling force, we submit that there is every reason for this court now to refuse to commit itself to a differentiation between "reconstruction" and "repairs" which can hereafter, equally with the differentiation between "repairs" and "original construction," be subject to "not inappropriate criticism."

At present the law may well be summarized: "as long as a vessel preserves her identity any work done in the way of alterations, enlargement or improvement, no matter how extensive, falls under the head of repairs" (28 Cyc. 764). There is neither precedent, logic, nor necessity to narrow the definition of "repairs" by the introduction in admiralty jurisprudence of an artificial class of repairs to be judicially severed into a separate group labeled "reconstruction" and read out of the statute.

Just as "necessaries" has always received from the courts a wide and untechnical interpretation—"wider in its meaning than when used by the common law courts in reference to the contracts of infants" (Hughes Admiralty (2d ed.), 109)—so now this court should give no artificial and technically narrow meaning to the term "repairs."

"*The Susquehanna,*" 267 Fed. 811:

Lake steamers were altered so as to fit them for ocean navigation. "The principal work was in length-

ening the steamers" (page 812). In its interpretation of the present statute the court drew a distinction between "repairs" and "reconstruction." No authorities are cited, and an examination of the briefs of counsel do not indicate that this point was raised on argument. It is a case of first impression.

Two reasons were assigned for the decision. The first was that the work "was not of a kind that owners of shipyards would undertake unless fully advised of the security they were going to have for payment. Contractors for such work do not need the same protection as did small dealers." On this basis extensive repairs or restorations would be equally excluded from the statute. It proves too much. The extent of the expenditures, even when large in comparison with the value of the vessel, is never the criterion of the existence or non-existence of a maritime lien.

"*The Iris*," 100 Fed. 104:

The second reason assigned for this "strict construction of the act" was "that the use of dry docks or marine railways was included in express terms." These references in no way control the scope to be given the words "repairs, supplies or other necessaries." They deal with an entirely different subject-matter than work upon a ship. They deal with cases when the use of an instrumentality, dry dock, or marine railway is let or licensed.

The weakness in this distinction is well illustrated in the next case rising in the same circuit:

"*The Harvard*," 270 Fed. 668:

The vessel, "formerly a private yacht, had been used by the Government during the war. The libellant furnished work and material and plant in 'repairing, altering, enlarging and improving the vessel's carrying capacity' in order to fit it for the service which was desired by its new owner, the claimant in the case . . . Some of the work on the Harvard was evidently actual repair work in the sense of restoring her to first class condition. Considerable of the work was evidently alteration or furnishing of accommodations, in which the previous condition of the accommodations was not satisfactory, and an actual enlargement of these accommodations was desired and necessary for her intended use. . . . The repairs embody certain changes or improvements, which were extensive in character. . . ." The district judge, having before him the decision in "the Susquehanna," held that in the case at bar "it was not reconstruction as in the case of 'The Susquehanna' (supra) nor could it be said to have been entirely a repair in the sense of replacing injured or damaged parts. It was, however, repair in the sense in which the word has always been used, both in maritime matters . . . and in work upon land."

On the facts it is hard to distinguish the two cases. If it means to point a difference between "reconstruction" and a combination between "repairs and reconstruction, it is introducing a distinction on a distinction. In every instance of necessity "reconstruction" must include items of "repairs." Is not the fact of the matter that the district judge realized that "The Susquehanna" was not to be accepted at face value; that while it would ill become him to overrule the case

directly or refuse to follow a precedent of his own circuit, he could establish a "distinction" to serve as the beginning of a line of authorities to correct the original aberration?

(B)

The only distinction which has hitherto existed in our decisions has been that between construction and repairs. All construction furnished to a vessel after she had become a subject of maritime jurisdiction, so long as she preserves her identity, was embraced within the term "repairs." Where construction ceased, repairs began. Only when a vessel got beyond repairs and was broken up, the use of her parts to form another vessel, it became again "construction."

Speaking for the Circuit Court of Appeals for the First Circuit, Judge Putnam explained the decisions of the Federal courts as supporting the principles expounded in "*The Iris*," 100 Fed. 104, a "case largely of reconstruction," as including reconstruction within the meaning of the word "repairs."

Ely v. *Murray & Tregurtha Co.*, 200 Fed. 368.

The present statute "makes no change in the general principles of the present law of maritime liens but simply substitutes a single statute for the conflicting state statutes."

> Committee on Judiciary, Senate Report #831 (61st Congress, 2d session), p. 4.

The purpose of the statute was not to create artificial distinctions, but "to remove the confusion now existing in an important branch of the admiralty juris-

prudence of the United States by simplifying the law and making it uniform throughout the country."

> Committee on Judiciary, House Report #772 (61st Congress, 2d session), p. 1.

(C)

If a distinction must be made between "repairs" and "reconstruction" under the statute, measured by the standards already discussed in our brief, it will be no stretch of fact or of law to hold that the work and material supplied to the "Jack O Lantern" were "repairs."

The hull of our vessel is intact from start to finish. As a car float that hull was the predominating element. In the "Jack-O-Lantern" it is still the predominating unit.

In addition to the cases which we have cited there are some other cases which are helpful in coming to this conclusion:

> "*The Convoy*," 257 Fed. 843.
> *Homer* v. "*Lady of the Ocean*," 70 Me. 350.
> *Donnell* v. "*The Starlight*," 103 Mass. 227.
> *Goodyear Shoe Machinery Co.* v. *Jackson*, 112 Fed. 146.
> *City of Covington* v. *Bullock*, 126 Ky. 236.
> *American Bonding Co.* v. *City of Ottumwa*, 137 Fed. 572.

We have cited this list of cases not intending to make it exhaustive and not contending that there are not conflicting decisions, but as typical of the decisions found in the books on analogous subjects which

attempt to draw a distinction between "reconstruction" and "repairs."

"*The Convoy*," 257 Fed. 843:

On an issue whether certain work in raising a vessel could be classified as "repairs" within the meaning of the statute, Chatfield, J., held that "the essential element would seem to be that the vessel was to be repaired—that is, to be restored—and that she had not been abandoned or treated as material for the building of another vessel."

Homer v. *Lady of the Ocean*," 70 Me. 350:

In a suit to enforce a lien the question was whether a vessel was rebuilt so that she had to be launched again or whether she was only repaired. The vessel had been hauled in, dismantled, her rigging taken off, her spars taken down; her timber was taken out stick by stick and replaced with new so far as the old was removed; the outboard skin was mainly left on; some streaks taken off for convenience, but, in the main, her timber plank remained until she was timbered and ceiled, when her outboard plank was taken off. The stem and lower apron were old; her floor timbers mainly old, some new timbers put in. The stem was in the same situation with reference to the keel.

The court held the test to be applied was not the comparative amount of new and old material used, nor was it necessary that the dimensions or burden should remain precisely the same.

> "The real test is whether the existence and identity of the vessel remains. . . . The work

> was begun and ended upon the 'Lady of the Ocean', one and the same vessel from the beginning to the end; during its progress the form and identity of the vessel remained; there was no time when the existence of one vessel ceased and that of another commenced."

The court called attention to the United States statute R.S. sec. 4170, which required a new register when a vessel had been "altered in form or burden, by being lengthened or built upon," and says that this provision clearly contemplates that such a change "does not make a new vessel, else the act would be a work of supererogation. Other acts provide for the registering of new vessels. This provides for old vessels already registered but which have been altered."

Donnell v. "*The Starlight*," 103 Mass. 227:

The work done on the steamer by the petitioners "consisted in enlarging or extending the promenade deck, taking off and replacing the hurricane deck, and sheathing inside, and other items, the whole or a considerable part of which was done in order to adapt the steamer to new uses and service."

On the authority of "The Ferax" the court held that it had no doubt that the labor and matters for which the petitioners claim their liens were furnished in the "Construction or repairs" of the steamer within the meaning of the statute.

Goodyear Shoe Machinery Co. v. *Jackson*, 112 Fed. 146:

This case is not only a leading case, but a representa-

tive case, of a group where the question is of the infringement of a patent on a machine when the patent covers a combination of mechanism embracing a number of essential elements. It was held no infringement by a purchaser who had one or more of such elements reconstructed when worn out or broken where there was in each case remaining elements or parts which were essential to the patent combination. The replacement of those parts worn out or broken constitute "repairs" and not "rebuilding." Judge Colt said (page 150):

> "A purchaser, then, may repair, but not reconstruct or reproduce, the patented device or machine. Repair is 'restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction.' Reconstruction is 'the act of constructing again.' Reproduction is 'repetition' or 'the act of reproducing.' These definitions are instructive in bringing home to the mind that repair carries with it the idea of restoration after decay, injury, or partial destruction, and that reconstruction or reproduction carries with it the idea of a *complete construction* or production over again. But the difficult question still remains, what is legitimate repair, and what is reconstruction or reproduction as applied to a particular patented device or machine? When does repair destroy the identity of such device or machine and encroach upon invention? At what point does the legitimate repair of such device or machine end, and illegitimate reconstruction begin? . . .

"When the patent is for a device embracing the combination of several elements, a purchaser will infringe by reconstructing the device after it has fulfilled its purpose and is *substantially destroyed*. . . .

"Where the patent is for a machine, which commonly embraces the combination of many constituent elements, the question of infringement by the purchaser will turn upon whether the machine is only partially worn out or partially destroyed, or is *entirely worn out, and so beyond repair in a practical sense*."*

City of Covington v. *Bullock*, 126 Ky. 236:

A street paved with asphalt fell into disrepair. The City ordinance directed that it be reconstructed of asphalt. The improvement consisted of resurfacing the street with asphalt pavement, a three-inch surface on the original macadam base. Held, the work constituted "repairs" and not "reconstruction." The court adopted the dictionary definition of "reconstruction" as "to construct again, to rebuild." If, on the other hand, the entire street is torn up and rebuilt, or built over again, the work is that of "reconstruction." The court pointed out that two thirds and more of the original construction remained, as well as the curbing. It tests the question whether the improvement was a repair or a reconstruction. "If the old skeleton or framework of the original structure is retained, and the worn parts are replaced with new material of the same or kindred sort, it comes clearly within the definition of 'repair.' If, on the other hand, the old structure is

*Italics all ours.

torn away, and a new one erected in place thereof, even though on the same general plan, then it is clearly a 'reconstruction;' and it is immaterial that a part of the material taken out of the old structure is put into the new. These definitions of the words 'repair' and 'reconstruction' apply with equal force and aptitude to all trades alike, and to all work alike, and have no different meaning when applied to 'repair' or 'reconstruction' of a house to that which they have when applied to the 'repair' or 'reconstruction' of a street."

American Bonding Co. v. *City of Ottumwa*, 137 Fed. 572:

A contract called for the paving of a street to be constructed with a stone curbing with a foundation of broken stone and sand, and six inches of concrete superstructure thereon, with a surface layer of two inches of asphaltum to be kept in repair by the contractor for seven years. After completion and use it became perforated with holes which the contractor undertook to repair by patchwork. The condition of the asphalt surface continued to grow worse, interfering with the use of the street. On account of the rotten material and bad workmanship, it is contended that this patchwork was not serviceable, and therefore, in the interests of economy, the whole service asphaltum coating was relaid. Held, that as applied to the whole pavement as a unit this resurfacing was repair work. Adopting the views of the judge of the trial court (page 580):

"It does seem to me like reconstruction would be a revamping, or reworking the whole thing

> over. The base was not changed; no change of the grade was made; no change in the curb. The change that was made was resurfacing, the recoating of the top."

To argue from these analogies is only to restate our case. Again such cases illustrate the undesirability of adopting arbitrary distinctions between "repairs" and "reconstruction."

If this court feels compelled to establish that distinction, then we submit what we have here are repairs and not reconstruction—the creation of a new vessel.

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Supreme Court of the United States.

October Term, 1921.

No. 131.

NEW BEDFORD DRY DOCK COMPANY,

APPELLANT,

v.

BLAKE G. PURDY,

CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

Claimant's Brief.

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Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 131.

NEW BEDFORD DRY DOCK COMPANY, APPELLANT,

v.

BLAKE G. PURDY, CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

Claimant's Brief.

STATEMENT OF THE CASE.

This is a libel *in rem* filed in the District Court of the United States in the District of Massachusetts on March 19, 1920, against the Steamer "Jack-O-Lantern," seeking to recover an alleged claim of seventeen thousand two hundred thirty-seven dollars sixty-two cents ($17,237.62) for work, labor, and materials. The work, labor, and materials on which the action is brought were furnished in the summer and fall of 1919 at Fairhaven, Mass. The vessel was owned by Blake G. Purdy of Boston and other owners. The libellant claims a lien under the provisions of the United States Lien Law of June 23, 1910 (p. 2). A contract was made between the libellant and the claimant for doing certain work for a lump sum under the contract and specifications, as set forth in the libellant's answer (pp. 1, 3, 7). The claim set up in the libel is partly on account of this

contract and partly on account of extras claimed to have been furnished and done. The answer denies any lien and denies the admiralty and maritime jurisdiction of the court (p. 8).

The cause was heard on the question of jurisdiction June 24, 1920, before Judge Morton of the United States District Court, who filed an opinion and a decree ordering the libel to be dismissed for lack of jurisdiction. From this decree the libellant appeals to this Honorable Court. The facts are set forth in the opinion of the court and are as follows (p. 9):

> "The 'Jack-O-Lantern' was originally a car-float of the usual type, something over two hundred feet long, with neither motive power nor steering gear, and having two lines of track on her single deck. The claimant bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, a large house, or superstructure, was built enclosing most of the deck and containing a dance-hall, rooms, balconies, etc. Steering apparatus and a steam plant of propeller type for propulsion were also installed."

For the purpose of carrying out these changes the contract now before the court was made between the claimant and the libellant. It covers, generally speaking, all the wood-work involved in the changes above outlined. The libellant did not install the power plant, but it did prepare the vessel for it. The scow was towed to the libellant's yard for the work to be done. The engine and boilers were there installed. As they

were not yet in working condition when the vessel left the libellant's yard, she was towed away. The contract and specifications are as stated in the pleadings.

The present question is whether, upon the foregoing undisputed facts, the contract was one for repairs and supplies such as creates a maritime lien. It is too late now to question, in a court of first instance at least, the rule that a contract to construct a vessel does not give rise to such a lien. In rebuilding operations the test is whether the identity of the vessel has continued or has been extinguished. It would serve no useful purpose for me to discuss the cases referred to in argument by the libellant. The matter turns, as I view it, upon a question of fact; and upon the facts stated I think it clear that the identity of the car-float which was delivered to the libellant was completely lost by the conversion into an amusement steamer under the contract in suit. It is true that the hull is substantially unchanged, but mere identity of hull is not sufficient to preserve the identity of the vessel.

> *McMaster* v. *One Dredge*, 95 Fed. Rep. 832.
> *The "Dredge A,"* 217 Fed. Rep. 617, 629, 630.

> "The 'Jack-O-Lantern' with her dance-hall, rooms, and power-plant, self-propelled and able to manoeuvre, is an essentially different vessel from the car-float which furnished the hull."

QUESTION INVOLVED.

Does work, labor, and materials used in building a car-float into a steamboat give a lien under the United States Lien Law of June 23, 1910?

The answer to this question involves the following points:

1. The contract in this case was one for construction, and therefore not maritime.

2. If not a contract for construction, it was for reconstruction and not "repairs."

3. This being a domestic vessel, it follows that any lien here depends on the United States Statute of June 23, 1910, which covers "repairs" but not reconstruction (and)—

4. The libellant has no lien either by general maritime law or by statute.

I.

The contract in this case was one for construction, and therefore not maritime.

The contract in this case was one for construction, and not for repairs to an existing steamer. It was not a maritime contract and would not have given rise to a maritime lien even if upon a foreign vessel.

(*a*) In the case at bar we start with a car-float of the usual type—with neither motive power nor steering gear, and having two lines of track on her single deck. The claimant bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, a large house, or superstructure, was built enclosing most of the deck and containing a dance hall, rooms, balconies, etc. Steering apparatus and a steam plant of the propeller type for propulsion were also installed (p. 9).

(*b*) This case is exactly on all fours with *McMaster* v. *One Dredge*, 95 Fed. Rep. 832, in the District Court

of Oregon (1899). There was a claim of a maritime lien for work done in making a scow into a dredge. After holding that the dredge when completed was a vessel and subject to admiralty jurisdiction, the court goes on to say:

> "The second objection to the claim of libellants is a more serious one; that is, that the contract in question was one for the original construction of the vessel, and is therefore not a maritime contract, of which a court of admiralty can take cognizance. The lien given by the state statutes can only be enforced in admiralty when the contract out of which the lien arises is maritime in its nature. A court of admiralty has no jurisdiction of a suit in rem against a ship for work, labor, and materials done and furnished towards the building of a ship, even though the law of the state gives a lien upon the ship therefor."

After citing and quoting decisions on repairs contrasted with construction work the court dismissed the libel in the following language:

> "Tried by this criterion, the work and labor and materials furnished in this case were for the building of the vessel. It can make no difference whether the scow was already built, and had theretofore been used for another purpose, or whether it was newly constructed for the purposes of a dredge. The purpose of this contract was to build this scow into a dredge. As a mere wood barge, the things done were not required. It was only for the purposes of a dredge, which, in its relation

with the scow, was a new thing, that the work and labor in this case were performed, and the materials furnished, and this is a building of the dredge within the rule adopted in the cases cited. What was done and supplied in this case was for the purpose of making the vessel what it was intended to be, and what it had theretofore not been,—a dredge, a thing with which the wood scow, as such, had no relation. This contract, therefore, is not a maritime contract. It was a contract to convert the wood scow into a dredge, which is precisely the same as one to build a dredge. The remedy of the libellants to enforce the lien given by the state statutes is in the state courts. This court is without jurisdiction. Ordered that the libel be dismissed."

If the word "steamboat" be substituted for "dredge" the language and reasoning of Judge Bellinger is exactly applicable to the present case.

(*c*) *McMaster* v. *One Dredge* has been cited and approved in other Federal courts, and particularly in *Thames Towboat Company* v. *Schooner "Francis Macdonald,"* 254 U.S. 242, and *Dredge A*, 217 Fed. Rep. 617, a case in the Eastern District of North Carolina in an opinion by Judge Connor in 1914. In this case there was a claim of lien under the United States statute. There was a hull equipped with boiler, condenser, and heater that was bought by one Mitchell, and taken to Philadelphia for the purpose of reconstructing it into a suction dredge and the claim was made for a lien for the work done in making this change. The court held that this was construction and not repairs.

"Coming to a practical view of the situation, described by the master, we find that Mitchell was in need of a 'suction dredge' for the purpose of dredging. He gathered certain elements, which, when brought together, assembled, co-ordinated, resulted in, or brought into existence the entity, the thing, which he desired. The 'old hull' was the first element obtained, and upon this he placed certain machinery and appliances, which being brought into orderly relation, constituted the dredge.

"The process, described by the master, is not 'reconstructing' or repairing an existing entity, but, by bringing together—correlating—a number of independent entities, constructing a definite entity; and this process is construction."

The work done in the present case was not to repair, reconstruct, or furnish anything to the steamer "Jack-O-Lantern," the vessel which the libellant has libelled in this case. Such a craft was not in existence. The work done by the libellant was not necessary to the repair of the original car-float. It was only necessary to bring the steamer which was libelled into existence, and until that work was done there was no steamer. None of the work done was of any aid or assistance to the car-float as a car-float. In fact the car-float itself on which the libellant went to work was destroyed and disappeared as a craft by means of the very work which the libellant did, and a new and entirely different type of vessel came into existence. This was construction of a steamboat and not repairs to a car-float.

II.

If not a contract for construction, it was for reconstruction and not "repairs."

(*a*) The libellant has claimed a lien under the United States Statute of June 23, 1910. This statute gives a lien for "repairs, supplies, and other necessaries," etc. Even if the contract in this case were a maritime one in its nature, the libellant must show that the work done comes within the description of "repairs." Repairs may include changes and alterations to an existing vessel to a certain extent, but not amounting to reconstruction. The distinction between repairs and reconstruction is drawn in two cases in New York: "*The Susquehanna*," 267 Fed. Rep. 811; "*The Harvard*," 270 Fed. Rep. 668. In the Susquehanna case the lake-steamers "Schuylkill" and the "Susquehanna" were hauled out in dry dock, cut in two, and lengthened to fit them for ocean service. A lien was asserted by the marine architects who made the plans. The Circuit Court of Appeals in New York held that the contract was maritime, but the work done was not repairs. "The work done was more in the nature of reconstruction than that of repairs. It was not of a kind that owners of shipyards would undertake without being fully advised of the security they were going to have for payment." The claimant of the "Susquehanna" having expressly submitted to the jurisdiction of the admiralty court a decree was ordered against her. The claimant of the "Schuylkill" persisted in the claim that there was no lien, and the libel was dismissed as to her with the right to amend into a libel *in personam* against the owner.

"*The Harvard*," 270 Fed. Rep. 668, in the New York District Court, was a libel against a vessel for repairs. The "Harvard" was a yacht used by the government during the war. The government services necessitated repairs to put her in condition, and at the same time the owner had the superstructure and quarters enlarged while the boat was being repaired. There was apparently no change in her hull or general characteristics amounting to reconstruction, and the lien was allowed. Before and after the work was done the "Harvard" was the same identical vessel. Her identity was at no time lost nor was there any substantial change in shape or size sufficient to amount to reconstruction, as in the "Schuylkill."

In the case at bar, Judge Morton has found as a fact that the identity of the car-float was completely lost by its conversion into an amusement steamer. The car-float hull was "treated" as material for the building of another vessel.

III.

This being a domestic vessel, it follows that any lien here depends on the United States Statute of June 23, 1910, which covers "repairs" but not reconstruction.

(*a*) The "Jack-O-Lantern" was a domestic vessel. Her owner lived in Boston. The work was done in Massachusetts (pp. 1, 6).

The United States Law of 1910, so far as it applies to this case, only removes the distinction between foreign and domestic vessels. It made no change in general principles of the present law of maritime liens.

Piedmont Coal Co. v. *Seaboard Fisheries Co.*, 254 U.S. 1, 11.

The "Oceana," 244 Fed. Rep. 82.
The "Hatteras," 255 Fed. Rep. 518.
The "Muskegon," 275 Fed. Rep. 348.

It does not include reconstruction.

The "Schuylkill," 267 Fed. Rep. 811.

(*b*) It does not create new classes of liens or make maritime what was not maritime before.

"J. Doherty," 207 Fed. Rep. 997.
"Sinaloa," 209 Fed. Rep. 287.
The "Hatteras," supra.
Thames Towboat Co. v. *Schooner "Francis MacDonald," supra.*
Piedmont Coal Co. v. *Seaboard Fisheries Co., supra.*
The "United States," 193 Fed. Rep. 552.

It does not include all services, even though the contract be maritime, but only such as are included in "repairs, supplies, or other necessaries" as those terms are construed by the courts.

The "Hatteras," supra.
The "Convoy," 257 Fed. Rep. 843.

(*c*) "Repairs" is a word of common meaning and use. It covers the replacing of worn or rotten parts of a vessel or parts which have been destroyed by tempest, fire, or time. It covers minor changes in cabin quarters and similar things. Such repairs may be very extensive; they may cover work done on a vessel which has been burned to the water's edge, and a whole new top required, as in *Hardy* v. *Ruggles,* Fed.

Cas. 6062; or very extensive repairs to broken hull and damaged decks and cabins, as in *North Pacific S.S. Co.* v. *Hall Bros. Co.*, 249 U.S. 119; or, as in the case of *The "Harvard," supra*, where the vessel hull was left unchanged, but changes made in quarters and cabin to fit the vessel for a new line of work; or to changes in cabin, extension of the hurricane deck, and similar matters, as in *Donnell* v. *"The Starlight,"* 103 Mass. 227. But in all such cases the vessel remained the same in every substantial respect. There was no change of identity. A steamer remained a steamer, and the work that was done was necessary for her to continue as a steamer and not to be turned into a different kind of vessel entirely. The work done was to enable her to navigate as a steamer. It came within the ancient rule and reason for maritime liens, namely, to furnish legs and wings to an existing vessel.

IV.

The libellant has no lien either by general maritime law or by statute.

If the contract in this case was a construction contract, the libellant would have no lien. Under the decisions of our courts for many years it would not even be a maritime contract.

> *The Peoples Ferry Boat Co.* v. *Beers*, 23 How. 392.
>
> *Thames Towboat Co.* v. *Schooner "Francis MacDonald,"* 254 U.S. 242.

If the contract in this case is one for reconstruction, then the contract might be maritime, but still the libel-

lant would have no lien, even assuming that a lien would exist upon a foreign vessel unless included within the terms of the United States statute. The distinction as to liens between foreign and domestic vessels is still law except as modified by the statute.

Piedmont Coal Company v. *Seaboard Fisheries Co., supra.*

The Statute of 1910 only changes the previous well-established law as to "repairs, supplies and other necessaries" which are construed to cover matters of the same nature as repairs and supplies.

The "Muskegon," supra.

Therefore, the claimant respectfully submits that the contract on which the libellant is suing is a non-maritime contract for construction; that the most favorable view of the contract for the libellant is that it was reconstruction, and if so, while the contract might be maritime, it does not come within the Statute of 1910, under which the libellant is claiming a lien, and, as this was a domestic vessel, the libellant would have no lien either under the statute or by general maritime law, and the District Court was right in ordering the libel to be dismissed.

Respectfully submitted,
GEORGE L. DILLAWAY,
Attorney for Claimant.

NEW BEDFORD DRY DOCK COMPANY *v.* PURDY, CLAIMANT OF THE STEAMER "JACK-O-LANTERN."

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 131. Argued January 27, 1922.—Decided February 27, 1922.

A contract for the wood-work involved in converting a car-float into an amusement steamer by removing the car tracks, relaying the decks as dancing floors and adding a superstructure, steering apparatus and steam propulsion plant, is a maritime contract for repairs as opposed to original construction, within the Maritime Lien Act of June 23, 1910, and within the admiralty jurisdiction of the District Court. P. 99.

266 Fed. 562, reversed.

APPEAL from a decree of the District Court dismissing a libel to recover damages and enforce a lien for repairs.

Mr. George R. Farnum, with whom *Mr. Lee M. Friedman* was on the briefs, for appellant.

Mr. George L. Dillaway for appellee.

The identity of the car-float was completely lost by the conversion into an amusement steamer. Mere identity of hull is not sufficient to preserve the identity of the vessel. *McMaster* v. *One Dredge,* 95 Fed. 832; *The Dredge A,* 217 Fed. 617, 629, 630; *Thames Towboat Co.* v. *The "Francis McDonald,"* 254 U. S. 242.

The work done was not to repair, reconstruct, or furnish anything to the steamer "Jack-O-Lantern," the vessel which the libelant has libeled in this case. Such a craft

was not in existence. The work done was not necessary to the repair of the original car-float. It was only necessary to bring the steamer which was libeled into existence. The car-float itself was destroyed and disappeared as a craft by means of the very work which the libelant did, and a new and entirely different type of vessel came into existence. This was construction of a steamboat and not repairs to a car-float.

The Act of June 23, 1910, gives a lien for "repairs, supplies, or other necessaries," etc. Even if the contract in this case were maritime in its nature, the libelant must show that the work done comes within the description of "repairs." The distinction between repairs and reconstruction is drawn in *The Susquehanna*, 267 Fed. 811; and *The Harvard*, 270 Fed. 668. The statute, so far as it applies, only removes the distinction between foreign and domestic vessels, making no change in general principles of the law of maritime liens. *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11; *The Oceana*, 244 Fed. 82; *The Hatteras*, 255 Fed. 518; *The Muskegon*, 275 Fed. 348. It does not include reconstruction. *The Schuylkill*, 267 Fed. 811.

It does not create new classes of liens or make maritime what was not maritime before. *The J. Doherty*, 207 Fed. 997; *The Sinaloa*, 209 Fed. 287; *The Hatteras, supra; Thames Towboat Co.* v. *The "Francis McDonald,"* 254 U. S. 242; *Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra; The "United States,"* 193 Fed. 552. It does not include all services, even though the contract be maritime. *The Hatteras, supra; The Convoy*, 257 Fed. 843.

"Repairs" may be very extensive. *Hardy* v. *Ruggles*, Fed. Cas. No. 6,062; *North Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119; *The Harvard, supra; Donnell* v. *The Starlight*, 103 Mass. 227. But they must not change the identity of the vessel.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Claiming a lien under Act of Congress approved June 23, 1910, c. 373, 36 Stat. 604,[1] and seeking to recover for work done and supplies furnished in pursuance of a contract with the owner of the "Jack-O-Lantern," appellant libeled the vessel. The libel was dismissed for lack of jurisdiction. If the agreement between the parties is maritime there was jurisdiction, otherwise there was none.

The facts are not in dispute. They were stated as follows by the District Court:

"The Jack-O-Lantern was originally a car float of the usual type, something over 200 feet long, with neither motive power nor steering gear, and having two lines of track on her single deck. The claimant bought her and proceeded to convert her into a steamer to be used for amusement purposes. The tracks were removed, the deck relaid to make a dancing floor, a large house, or superstructure, was built, inclosing most of the deck, and containing a dance hall, rooms, balconies, etc. Steering apparatus and a steam plant of the propeller type for propulsion were also installed.

"For the purpose of carrying out these changes the contract now before the court was made between the claimant and the libelant. It covers, generally speaking, all the woodwork involved in the changes above outlined. The

[1] Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

libelant did not install the power plant, but it did prepare the vessel for it. The scow was towed to the libelant's yard for the work to be done. The engine and boilers were there installed. As they were not yet in working condition when the vessel left the libelant's yard, she was towed away."

Upon these facts it held that the contract was not one for repairs or supplies, but for original construction, and therefore non-maritime within the doctrine of *Thames Towboat Co.* v. *The "Francis McDonald,"* 254 U. S. 242. "In rebuilding operations the test is whether the identity of the vessel has continued, or has been extinguished." "The matter turns, as I view it, upon a question of fact; and upon the facts stated I think it clear that the identity of the car float which was delivered to the libelant was completely lost by the conversion into an amusement steamer under the contract in suit. It is true that the hull is substantially unchanged; but mere identity of hull is not sufficient to preserve the identity of the vessel." "The Jack-O-Lantern, with her dance hall, rooms, and power plant, self-propelled and able to maneuver, is an essentially different vessel from the car float, which furnished the hull." In support of this conclusion *McMaster* v. *One Dredge,* 95 Fed. 832, and *The Dredge A,* 217 Fed. 617, 629, 630, were cited.

It is not always easy to determine what constitutes repairs as opposed to original construction. A contract for the former is maritime; if for the latter, it is not. We are not disposed to enlarge the compass of the rule approved in *Thames Towboat Co.* v. *The "Francis McDonald,"* under which contracts for the construction of entirely new ships are classed as non-maritime, or to apply it to agreements of uncertain intendment—reasonable doubts concerning the latter should be resolved in favor of the admiralty jurisdiction. Nor do we think that in

cases like the instant one any refined distinction should be made between reconstruction and repairs—the latter word as used in the statute has a broad meaning.

As pointed out in *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11, 12, the Act of June 23, 1910, makes "no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes."

This court has not undertaken and will not now essay to announce rigid definitions of repairs and new construction; but we do not accept the suggestion that the two things can be accurately differentiated by consideration of the ultimate use to which the vessel is to be devoted. The view expressed by Judge Hughes in *United States* v. *The Grace Meade*, Fed. Cas. No. 15,243, is both sound and helpful. "And generally, it may be held as a principle, that, where the keel, stem, and stern-posts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel. But where no piece of the timber of an old vessel is used without being first dislocated and then replaced, where no set of timbers are left together intact in their original positions, but all the timbers are severally taken out, refitted, and then reset, there we have a very different case. That is a case of a vessel rebuilt."

There was jurisdiction in the court below to determine and enforce the rights of the parties. Its judgment to the contrary must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.